

*This is our summary of some of the key legal developments across a range of sectors for the weeks of 21 December 2009 and 28 December 2009. It is intended for reference purposes only and does not constitute definitive advice. Links to the original source materials are included where there are no restrictions in terms of access. References may also be made to sources that require separate registration or subscription. A link to a source does not necessarily imply endorsement of the source or the material provided through the link.*

*For further information on any of the matters discussed in the summary please contact our Professional Support Lawyer, [Sarah Kirkness](#). If you have any comments, queries or suggestions please contact us at [comments](#). All suggestions and comments are most welcome. If you do not wish to receive this summary you can contact us at [unsubscribe](#).*

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### General

#### BIS' Update on Implementing Digital Britain Strategy

The BIS has published another update on progress to date in implementing the Digital Britain White Paper. This latest update looks at what has been achieved since the first update in June 2009 (and see the Need to Know of 29 June 2009 for details), with a focus on the "key achievements" such as the introduction of the Digital Economy Bill into the House of Lords, the publication of the PWC report on the economics of digital inclusion as part of the drive towards full digital inclusion, the launch of the Consortium for the Promotion of Digital Participation and the publication of the Higher Education Framework 2009 and the National Skills Strategy. The update reports that around one quarter of the actions and recommendations set out in the White Paper have been completed in the first six months of implementation. See [http://www.culture.gov.uk/images/publications/DB\\_Implementationplan\\_Dec09.pdf](http://www.culture.gov.uk/images/publications/DB_Implementationplan_Dec09.pdf) for details.

#### Regulation Establishing BEREC Published in OJEC

Regulation (EC) No 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office was published in OJEC on 18 December 2009. The Regulation sets out the details about the role and tasks of the regulator in giving effect to the EU regulatory framework for the development of an internal market for electronic communications networks and services by the establishment of BEREC. BEREC will replace the European Regulators Group (ERG) during the spring of 2010 and will act as an exclusive forum for co-operation among national regulatory authorities (NRAs), and between NRAs and the Commission, in the exercise of the full range of their responsibilities under the EU regulatory framework for electronic communications. The Regulation enters into force twenty days after its publication. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0001:0010:EN:PDF> for details.

#### Amending Directive on Universal Service and Users' Rights Published in OJEC

Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws has been published in OJEC. This wide-ranging and amending Directive deals with the reform of the EU regulatory framework for electronic communications networks and services by amending Directives 2002/22/EC (Universal Service Directive) and 2002/58/EC (Directive on privacy and electronic communications) however the Directive acknowledges that "In accordance with the principle of subsidiarity, it is for the Member States to decide on the basis of objective criteria which undertakings are designated as universal service providers, where appropriate taking into account the ability and the willingness of undertakings to accept all or part of the universal service obligations". See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:EN:PDF> for details. The Directive entered into force on 19 December 2009 (the day after its publication in OJEC) and Member States have until 25 May 2011 to adopt and publish by the laws, regulations and administrative provisions necessary to comply with the Directive's terms.

#### Amending Directive on Electronic Communications Published in OJEC

Directive 2009/140/EC amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services has been published in OJEC. The Directive acknowledges that the EU regulatory framework for electronic communications networks and services should be reformed in order to complete the internal market for electronic communications by strengthening the Community mechanism for regulating operators with significant market power in the key markets. This reform also includes "the definition of an efficient and co-ordinated spectrum management strategy in order to achieve a single European information space and the reinforcement of provisions for users with disabilities in order to obtain an inclusive information society". According to the Directive, the aim is progressively to reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only.

The Directive entered into force on 19 December 2009 (the day after its publication in OJEC) and Member States have until 25 May 2011 to adopt and publish by the laws, regulations and administrative provisions necessary to comply with the Directive's terms. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF> for details.

### ICO Issues Practical Guidance on Public Affairs Exemption

The Information Commissioner's Office (ICO) has issued practical guidance for public authorities on the process of claiming an exemption from disclosing information under section 36 of the Freedom of Information Act 2000. This section allows for an exemption where the authority reasonably believes that releasing information would prejudice the effective conduct of public affairs. The guidance notes that this is a "qualified exemption requiring consideration of the public interest test, except where the information is held by either House of Parliament". The ICO suggested that all public authorities have in place a standard procedure for placing matters before the relevant qualified person whose opinion is being sought and also referred to their previously published general guidance on the effective conduct of public affairs in the application of the exemption in section 36 (AG25) and further guidance on the public interest test (AG3). See [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/section\\_36\\_practicalities\\_v1.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/section_36_practicalities_v1.pdf) for details.

### Reminder - Provision of Services Regulations in Force

A reminder that the Provision of Services Regulations, SI 2009/2999 came into force on 28 December 2009, implementing the Services Directive 2006/123/EC in the UK. The Services Directive is intended to remove barriers to the cross-border provision of services within the EEA by making it easier for businesses based in an EEA state to provide services in other EEA states, and increasing the information available to customers about using services provided by businesses based elsewhere in the EEA. The Regulations will apply to the majority of private sector businesses providing services in the UK and impose obligations on businesses to make information available to customers and to deal with customer complaints promptly. They also prohibit discrimination against individual customers in the provision of services on the basis of place of residence, unless such different treatment can be objectively justified. See [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20092999\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092999_en.pdf) for the Regulations and <http://commercial.practicallaw.com/8-501-0896> for PLC's useful Practice Note on the implications of the Regulations for businesses.

## Broadcasting

### Broadcast Bulletin - Latest (Bumper) Issue

The latest issue of Ofcom's Broadcast Bulletin has been published, with details of its adjudications on breaches of Rules 1.3 (children must be protected by appropriate scheduling), 1.14 (the most offensive language must not be broadcast before the watershed), 1.16 (offensive language must not be broadcast pre-watershed unless justified by the context), 2.3 (material which may cause offence must be justified by the context), 2.11 (competitions should be conducted fairly), 2.13 (broadcasters must take precautions to maintain a low level of risk to viewers who have PSE), 10.3 (products and services must not be promoted in programmes) and 10.4 (no undue prominence in any programme to a product or service) of the Broadcasting Code. The details of the adjudications on the three complaints of unfair treatment raised following the broadcast of the BBC programme "Pedigree Dogs Exposed" are also included. In addition, Ofcom also partially upheld a complaint of unfair treatment and upheld the complaint of unwarranted infringement of privacy and upheld a separate complaint of unwarranted infringement of privacy. Ofcom also informed broadcasters that its guidance on Rule 9.13 on sponsorship credits monitoring has been incorporated in the guidance to Section Nine of the Code. Separately, Ofcom also recorded a breach of Rule 4 of the Code on the Scheduling of Television Advertising (COSTA) (time devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes). See [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb148/Issue148.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb148/Issue148.pdf) for details.

### Reminder - Licensing Requirements for Must-Offer Obligations for Network and Satellite Services

A reminder that the Communications Act 2003 (Commencement No 4) Order 2009, SI 2009/2310 will bring sections 272 and 272 of the Communications Act 2003 into force on 31 January 2010 (the must-offer obligations in relation to networks and satellite services). Section 272 requires Ofcom to include in the licences for every licensed public service channel, the public teletext service and every licensed television service added to the list of must-carry services under section 64 conditions which it considers appropriate for securing the three objectives set out in sub-sections (2) to (4) of section 272. Similarly, section 273 requires Ofcom to include in the licences for every licensed public service channel, the public teletext service and every other licensed television service specified by

the Secretary of State conditions which it considers appropriate for securing the three objectives set out at sub-sections (2) to (4) of section 273. The three objectives, which are similar for both are that the channel or other service, so far as it is provided in digital form, is at all times offered as available (subject to the need to agree terms) to be broadcast or distributed by means of every appropriate network (a similar requirement applies in respect of the satellite service); that the person providing the channel or other service does his best to secure that arrangements are entered into, and kept in force to ensure that that the channel or other service, so far as it is provided in digital form, is broadcast or distributed on appropriate networks and is able to be received; and that the arrangements entered into and kept in force for the purpose of securing the second objective prohibit the imposition, for or in connection with the provision of an appropriate network (or satellite television service), of any charge that is attributable (whether directly or indirectly) to the conferring of an entitlement to receive the channel or other service in question in an intelligible form by means of that network.

### Commission Concerns Over Member States Implementation of AVMS Directive

The European Commission has raised concerns about the lack of progress in implementing the requirements of the AVMS Directive. Member States had a two year period to transpose the new EU rules on TV and TV-like services like video on demand and mobile video and as at the implementation date of 19 December 2009, only Belgium, Romania and Slovakia had notified the Commission of full implementation. Denmark, France, Luxemburg and the UK notified the Commission of some measures having been taken to put the AVMS Directive in place. Hungary's legislative process ceased entirely after Parliament did not pass the draft law. The Directive has been partly put in place by Austria, Germany, Ireland, Malta and the Netherlands without the Commission having been notified. The Commissioner for Information Society and Media called on Member States to urgently adapt their national laws to ensure that new advertising techniques enabled by the AVMS Directive are also possible and said there can be no excuse for any more delay with the Directives implementation. The Commissioner also warned that the Commission would not hesitate to use its enforcement powers to ensure the Directive is implemented. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1983&format=HTML&aged=0&language=EN&guiLanguage=en> for details of the current status of the Directive across the EU.

## Corporate

### Appeal Against Determination of Beneficial Ownership of Shares - Grounds for Appeal

The Court of Appeal has dismissed an appeal against a finding that the company was the beneficial owner of four issued shares in another company on the basis that it had not been shown that the judge's findings of fact on which he had based his decision had been wrong. The first claimant company had formed the second company to develop the 'Dialtime idea and the preliminary issue in dispute was whether Fanmailuk.com Limited was the beneficial owner of the four issued shares in Dialtime Plus Limited. It was common ground that the beneficial ownership of the shares had to be determined as at the date when the shares were originally allotted in 2001. In the absence of a legally binding express agreement about beneficial ownership it was for the court to ascertain from all the surrounding circumstances the intentions of those who participated in the transactions and other relevant events. The court said it had not been shown that the declaration made by the judge had been wrong, or that the findings of fact on which he based it had been wrong - the court said "In deciding the beneficial ownership of the shares, the judge was entitled to take into account all the circumstances surrounding the formation of DPL and to conclude that they pointed to a resulting trust for Fanmail" and noted that the judge's findings were findings of fact made without any misdirection as to law or approach and after hearing the evidence. The findings were made after very careful and detailed consideration of the documentary and oral evidence. (*FanmailUK.com Ltd & Ors v Cooper & Ors [2009] EWCA Civ 1368* - see <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1368.html> for the judgment).

### Article - Corporate Manslaughter: Sentencing Guidelines

The latest Company Secretary's Review has published an article looking at the draft guideline on sentencing for corporate manslaughter and health and safety offences causing death, published for consultation by the Sentencing Guidelines Council. Rather than applying a formula based approach to determining the level of a fine, the Council proposed a level below which a fine should not normally fall, supported by a general indication concerning the extent to which it should be above that level. The article considers the other factors that are taken into consideration by a court when determining the level of a fine and states "While the Council has decided that a fixed correlation between the fine and either turnover or profit is not appropriate, the draft guideline says that the court should look carefully at turnover, profit and assets in order to gauge the resources of the defendant. In deciding the level of the fine, the Council also says that courts should not be influenced by the impact on shareholders and directors, but the impact on employment may need to be taken into account and, in the case of public authorities, the impact on service provision should be considered". The Council's current consultation on the

draft Guidelines closes on 5 January 2010 and the Council will then consider the responses. (*"Corporate Manslaughter: Sentencing Guideline" (2009) 33 CSR 17, 134 - the article is available via LexisNexis*).

## Gambling

### Advocate General's Opinion in Betfair Case

The Advocate General has delivered his opinion in Betfair's case against the Dutch Government in the ECJ. The opinion accepted Betfair's argument that sports betting licences should be allocated or renewed in a transparent and equal manner. The case originated in a dispute between The Sporting Exchange Ltd, trading as Betfair, which is established in the UK, and the Minister van Justitie (Netherlands Minister of Justice), concerning the rejection of Betfair's applications for a licence for the organisation of gambling in the Netherlands and its actions against the decisions to extend the licences of De Lotto and SGR. Betfair had argued that Dutch consumers should have the right to access Betfair's English language website and also questioned the legality of the Dutch licensing system, which had resulted in its having been twice denied the opportunity to apply for a sports betting and horseracing licence. Betfair argued that the principles of equal treatment and transparency should apply to the allocation of such licences. See [http://corporate.betfair.com/AG\\_Opinion\\_Press\\_FINAL\\_17\\_12\\_09.pdf](http://corporate.betfair.com/AG_Opinion_Press_FINAL_17_12_09.pdf) for Betfair's Press Release welcoming the Opinion and which also provides details of the case generally and <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-203/08&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor> for access to the recent Opinion and Reference. The ECJ will consider the case later this year - note that the Advocate General's Opinion is persuasive but not binding on the Court.

## Litigation

### Court of Protection's Rules to be Reviewed

The rules of the Court of Protection President are to be reviewed following the announcement by the President of the Court that an ad-hoc committee has been formed to undertake a review of the Court of Protection Rules 2007 and the practice directions and forms which accompany the Rules. The Committee will "produce recommendations for new rules or amendments to existing rules, and supporting practice directions and forms, which set out a fair and efficient procedure in rules which are both simple and simply expressed". (*Judicial Communications Office News Release 33/09*)

## Music

### Competition Commission Clears Ticketmaster/Live Nation Merger

The Competition Commission has published its Final Report on report on the anticipated merger between Ticketmaster Entertainment, Inc and Live Nation, Inc recommending, perhaps somewhat surprisingly given its provisional decision, that it now should be allowed to proceed. The Commission said it had concluded that the merger will not result in a substantial lessening of competition in the market for live music ticket retailing or in any other market in the UK, including live music promotion and live music venues. The Commission said the merger "will make little difference to the prospects of Eventim's success in the UK [Eventim is Ticketmaster's largest global competitor]. Although Live Nation's incentives will change as a result of the merger, the merged entity will have little scope to affect Eventim as, under the agreement, Eventim will continue to receive a fee for every Live Nation ticket sold and Live Nation will continue to be obliged to allocate a minimum number of tickets to Eventim". The Commission said the extent of Eventim's success in the UK will be determined principally by its own efforts and abilities, and will not be affected significantly by the merger. Live Nation is principally a promoter of live music events and an owner/operator of live music venues. Ticketmaster is principally a ticket agent, and sells many tickets on behalf of live music promoters and venue operators. The US Department of Justice is investigating the implications of the merger in the US. See [http://www.competition-commission.org.uk/rep\\_pub/reports/2009/fulltext/552.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2009/fulltext/552.pdf) for the Final Report.

## Publishing

### Critical Report on the Impact of UK Libel Laws and Calls for Reform

After a year-long Inquiry, English PEN and Index on Censorship have published their report on English libel law, concluding that it "has a negative impact on freedom of expression, both in the UK and around the world". The report said the current law "imposes unnecessary and disproportionate restrictions on free speech, sending a

chilling effect through the publishing and journalism sectors in the UK" and "does not reflect the interests of a modern democratic society". The report set out ten separate recommendations, the adoption of which they said it necessary to restore the balance between free speech and reputation and called for their adoption in a Libel Bill, "which would simplify the existing law, restore the balance between free speech and the protection of reputation, and reflect the impact of the internet on the circulation of ideas and information". Their suggestions include capping damages at £10,000, introducing a single publication rule, the exemption of the interactive online services and interactive chat from liability, strengthening the public interest defence and capping base costs and make success fees and "After the Event" (ATE) insurance premiums non-recoverable. See [http://libelreform.s3.amazonaws.com/LibelDoc\\_LowRes.pdf](http://libelreform.s3.amazonaws.com/LibelDoc_LowRes.pdf) for the report.

#### Statement in Open Court - False Allegations of Assault

The claimant, a property developer, brought libel proceedings against the publisher of The Sunday Mirror following the publication of an article which alleged that he had attacked a model, potentially ruining her career. Although the claimant had been arrested following a complaint by the model, he was not charged and the allegations were without foundation. The defendant accepted that the allegations were untrue, apologised to the claimant, undertook not to republish them and agreed to pay substantial damages and his legal costs. (*Ed Buxton v MGN Limited, Unreported, QBD, 10 December 2009*).

#### Sport

##### Gambling Commission Writes to Racecourse Managers Over Corporate Hospitality Facilities

The Gambling Commission has written to the managers of all the UK's racecourses outlining its concern about the manner in which corporate hospitality boxes being offered at racecourses could be used to facilitate gambling. The Commission said "Racecourses should be careful not to set up arrangements that amount to the track, or people who hire a box at the track, providing facilities for gambling. This would require an operating licence in addition to any premises licence which they may already hold". See <http://www.gamblingcommission.gov.uk/pdf/corporate%20hospitality%20at%20racecourses.pdf> for details.

#### Consultations & Reports

Ofcom Consultation - Applying Spectrum Pricing to the Aeronautical Sector - A Second Consultation - [http://www.ofcom.org.uk/consult/condocs/spectrum\\_pricing/aip2.pdf](http://www.ofcom.org.uk/consult/condocs/spectrum_pricing/aip2.pdf) (Ofcom's second consultation sets out revised proposals to apply revised Wireless Telegraphy Act licence fees to certain aeronautical uses of the radio spectrum, specifically the use of aeronautical VHF communications frequencies in the band 117.975 - 137 MHz, which is shared between military and civilian users).